

REPORT TO THE EASTERN AREA PLANNING COMMITTEE

Date of Meeting	19 July 2012
Application Number	E/2012/0359/FUL
Site Address	21-22 High Street, Marlborough SN8 1LW
Proposal	Change of use of ground and first floors to A1/A3 use
Applicant	Nero Holdings Ltd
Town/Parish Council	MARLBOROUGH
Grid Ref	418775 169045
Type of application	Full Planning
Case Officer	Peter Horton

Reason for the application being considered by Committee

The application has been called to committee at the request of the Division Member, Cllr Nick Fogg.

1. Purpose of Report

To consider the recommendation that the application be approved subject to conditions.

2. Report Summary

The main issue to consider is whether or not the development makes a positive contribution to the vitality and viability of Marlborough town centre and therefore whether or not change of use from A1 to mixed use A1/A3 should be allowed at this site within the Marlborough High Street.

3. Site Description

The application concerns a characterful but unlisted red bricked building on the southern side of Marlborough High Street, situated on the corner of the access to Hilliers Yard. The site was formerly occupied by Dash, a clothes shop, but at the time the current application was submitted, works were already underway to fit the unit out for use as a Caffe Nero outlet. Indeed, the cafe opened on 30 April 2012, six weeks into the life of the current application.

4. Planning History

None

5. The Proposal

The proposal is to change the use of the ground and first floors of the building from A1 to mixed A1/A3 use. The internal layout consists of a large sales counter with an extended display of products with coffee machines and equipment, and a refrigerated unit enabling customers to select sandwiches and cold drinks which may be eaten on the premises or be taken away. Seating is provided on the ground floor and towards the front of the first floor. Storage and WC facilities are positioned towards the rear of the first floor.

The predominant use is as a cafe (A3). However there is an element of A1 use akin to a sandwich bar use e.g. takeaway sales of sandwiches, cakes and hot and cold drinks.

No cooking takes place on the premises, only the re-heating of a limited range of pre-prepared foods (all of which can be eaten cold anyway). Hence there is no need for an extraction flue.

The change of use was implemented without the benefit of planning permission whilst the application was still undetermined. Hence the application is retrospective.

6. Planning Policy

Kennet Local Plan policies PD1 and ED18 are relevant. Under the provisions of ED18, the site is designated as lying within the Prime Shopping Area of Marlborough, within which planning permission will not be given for the change of use of ground floor premises for uses other than A1 (retail) uses unless “the development makes a positive contribution to the vitality and viability of the centre”.

The National Planning Policy Framework (NPPF) sets out central government planning policy. Its paragraph 23 is particularly relevant. This states that: “Planning policies should be positive, promote competitive town centre environments and set out policies for the management and growth of centres over the plan period”. It goes on: “In drawing up Local Plans, local planning authorities should (amongst other things): (a) recognise town centres as the heart of their communities and pursue policies to support their viability and vitality; (b) define the extent of town centres and primary shopping areas, based on a clear definition of primary and secondary frontages in designated centres, and set policies that make clear which uses will be permitted in such locations, and; (c) promote competitive town centres that provide customer choice and a diverse retail offer and which reflect the individuality of town centres”.

The NPPF glossary defines primary frontages as “likely to include a high proportion of retail uses which may include food, drinks, clothing and household goods”.

On June 29 2012 the applicant won an appeal for a similar retrospective planning proposal in Skipton, Yorkshire. This is highly relevant to the consideration of the current proposal both because it is a comparable case and because it post-dates the NPPF. The appeal will be referred to in section 9. A copy of the Inspector’s decision letter on this enforcement appeal is attached as an appendix to this agenda..

7. Consultations

Town Council: Object for the following reasons:

- The town does not need more coffee shops. To allow another coffee shop would harm the viability of existing locally owned outlets, and harm the vitality and viability of the High Street. As a major tourist destination, Marlborough needs a healthy and varied mix of retail outlets;
- The A3 use would harm the amenity of the 3 flats above due to: (a) excessive noise from piped music, air conditioning units and extractor units; (b) smells from food preparation, and; (c) insufficient sound proofing between walls and floors;
- The retrospective nature of the application shows a total disregard for the feelings of the community, including local businesses and the very residents the applicant is hoping to serve and be part of.

Environmental Protection: No objection, but recommends a precautionary condition, namely that an acoustic and vibration impact assessment of the air conditioning system be submitted to the Environmental Protection Team. The assessment must determine the internal noise and vibration impact on the property above the cafe, and the external noise exiting the louvre. The report must make recommendations for a mitigation scheme based on the findings of the assessment. The condition will not be discharged until any such mitigation work has been completed to the satisfaction of the Environmental Protection Team.

Highway Authority: No objection.

8. Publicity

One letter of support has been received from a member of the public.

Objections have been received from 66 members of the public and local traders. Their main points of concern can be summarised as follows:

- The charm of the town is largely due to the variety of interesting, attractive and “different” retail units provided by small independent businesses. The town is already well served by A3 outlets and the presence of another cafe (and from a national chain) will do little to preserve the vitality, viability and individuality of the High Street. Instead, Marlborough will lose its character, becoming a dull identikit clone town – a bland copy of other samey towns dominated by multiples rather than the unique and individual mix there is at present. There will then be less incentive for tourists to visit;
- Marlborough does not need another chain coffee shop – it already has Costa and Waitrose;
- Caffè Nero’s size and economic weight will enable it to compete unfairly with its independent competitors, which will not be able to match its economies of scale and which will go out of business. Profits will not remain in the local economy but will be returned to central office and shareholders. There is only so much coffee that can be drunk in a day: to allow this application will result in one or more existing operators from being forced to close;
- The site is in a prime location within the High Street – it should remain in A1 use;
- Caffè Nero is by definition a cafe and the application falls squarely into class A3: the claim of being part A1 use is a ruse to get around policy ED18;
- It would be inconsistent to allow the application as an appeal was dismissed in 2009 to change the use of the former Age of Elegance store (10 High Street) to an A3 restaurant;
- To allow the application would set a precedent for further similar applications;
- Object to the aggressive and disrespectful stance of Caffè Nero and the way in which planning procedures have been disregarded and the change of use has been implemented in advance of planning permission being granted. This brings the planning system into disrepute: the application should be resisted with a strong message that planning regulations are to be adhered to;
- Noise, vibration and smells from the air conditioning and extraction units, and noise from customers, will be detrimental to the amenities of the occupiers of the 3 flats above the proposed cafe, and will be detrimental to the trade of the adjoining shop to the rear;
- No allowance seems to have been made for the waste that will be generated - where will waste be stored?
- The take-away trade will generate additional litter on the High Street.

The Marlborough Chamber of Commerce objects for the following reasons:

- The site lies in a prime retail location: to preserve the vitality of the High Street, the premises should remain in A1 use;
- The town is already well served by A3 outlets. Yet another one will not enhance the vitality and viability of Marlborough as a local and regional retail destination;

The company’s decision to press ahead before the planning application has been determined displays a nonchalant attitude towards the town and the will of other businesses there. Fear that Caffè Nero will not be the “good neighbour” that they need at a time when all businesses have to work together to maintain and enhance the vitality of the town.

9. Planning Considerations

This is a retrospective application because the proposed change of use was implemented 6 weeks after the application was submitted in what would appear to have been a calculated course of action. Whilst this breach of planning regulations is an extremely unfortunate action which the local planning authority can in no way condone, it is not a criminal offence, and the planning application stands to be determined on its individual planning merits. It is worth noting in the Skipton case that the Inspector commented: “I have noted the concerns raised at the Hearing that the use proceeded before planning permission was granted. I do not condone that course of action but it is not a good reason to withhold consent, especially when no harm has been shown to arise from the coffee shop use”.

The application concerns a former retail unit situated in the heart of Marlborough High Street, just a few doors down from Waitrose. The site lies within the Marlborough Prime Shopping Area as defined by the Kennet Local Plan. Policy ED18 seeks to resist changes of use of ground floor premises here unless it can be demonstrated that the proposed development makes a positive contribution to the vitality and viability of the shopping centre. This particular application seeks to 'get around' this policy by having applied for mixed A1/A3 use, claiming that the A1 sales are too great to be considered ancillary. It is clear that most customers of Caffè Nero stay on the premises to consume coffee. Indeed, 83% of them did so in a survey undertaken by officers over an 8 hour period on 21 May 2012 (although the applicant's own figures, taken over a longer period, show the figure to be 75%). Hence this is predominantly an A3 use. However a significant minority of clients do buy to consume off the premises and case law indicates this to be an A1 use. Indeed the Skipton Inspector stated: "I noted this mix of uses at the times of my site visits". Hence it is not invalid for the applicant to have applied for mixed A1/A3 use.

As has been pointed out by so many of the objectors, Marlborough benefits from a high number of outlets where it is possible to buy coffee. Hence it could be argued that Marlborough does not 'need' an additional A3 unit. Furthermore, many of the objectors comment that Marlborough benefits from a high percentage of independent traders, a factor which results in much of the charm, uniqueness and individuality of the shopping centre which draws in visitors. Hence there is strong local feeling that national multiples such as Caffè Nero should be kept out, particularly if a consequence of them 'infiltrating' Marlborough High Street would be the closure of existing independent traders who benefit from less prime locations. However planning case law has indicated that matters of commercial competition are not a valid planning consideration and that it is for the market to shape the complexion of the pattern of traders found in the town. Hence whilst appreciating the arguments that have been put forward, the fact that Caffè Nero is a national multiple is not a matter that can be allowed to influence this planning decision. Indeed, the Skipton Inspector noted: "It was also suggested that allowing this appeal would adversely impact on the lawful A3 uses in the Core Retail Area. Again there is no evidence to support this concern. In any event it is not the role of the planning system to control competition between the providers of various services and goods".

The key issue is whether the predominantly A3 use which is now operating from the application site can be said to make a positive contribution to the vitality and viability of the shopping centre. In essence, does the unit represent a comparatively dead frontage, or does it present a vibrant shop unit with a high footfall which adds to the retail offer of the shopping centre? On the number of occasions that the case officer has viewed the cafe in operation, it has always appeared to be busy with a high occupancy rate at the downstairs tables. During the 8 hour period surveyed on 21 May, 219 adult customers (an average of 27 customers per hour) passed through the cafe. This was a Monday, which by all accounts is the quietest day of the week and not wholly representative. On a survey undertaken by the applicant for 11 hours per day on the 3 days Thursday 14 June to Saturday 16 June the average daily figure (presumed to include children) was 624. These must have been unusually busy days, as the applicant claims that trading figures over the longer period 14 May to 4 June showed 2600 customers per week i.e. 371 per day). The results of the applicant's survey are set out in their 'Planning Statement June 2012' and can be viewed on the file or on line.

It has been noted that the applicant claims that 25% of customers visit for the purpose of take away sales, i.e. A1 uses. Based on the applicant's claim of 2600 customers per week, this makes for 650 customers per week visiting for take away sales. This is a higher number than indicated by the Council's more limited survey undertaken on a Monday. Nevertheless, the numbers of take away customers are not insignificant, and according to the applicants are notably higher than many retail units in the vicinity. Furthermore, according to the applicant's 3 day survey, overall numbers of customers visiting Caffè Nero were higher than any of the other nearby retail units in 15 to 25 High Street, with the exception of Waitrose. The unit would appear to generate footfall in its own right, and would most likely be attracting greater numbers of customers than the previous clothes shop use.

The three surveys are not directly comparable and the applicant's figures cannot be independently verified. However none of the surveys is indicative of a unit with limited public appeal. The surveys suggest that there is a market for the services offered by Caffe Nero, and whilst there may well be a preference amongst certain sectors of the community for the highest possible representation of independent traders in the town, the evidence suggests that the cafe provides a service which, for all its detractors, is highly popular. It cannot therefore reasonably be concluded that the proposed Caffe Nero unit is detrimental to the vitality and viability of the town centre. This was the finding of the Skipton inspector, who stated: "It is clear to me that the use of the unit as a coffee shop creates vitality in this part of the town centre and performs substantially better than the average number of customers visiting A1 uses in the street. I therefore conclude that the coffee shop use does not result in any harm to the vitality of Skipton Town Centre".

In 2009 an appeal was dismissed (ref. K/58864/F) for various alterations/extensions to the grade II listed former Age of Elegance store at 10 High Street, including a proposal to change its use from A1 to A3. It is understood from what an objector to the current application has claimed that the intended use was as a specialist fish restaurant, although this was not made explicit in the appeal application. As well as expressing concerns on various listed building issues, the Inspector found in favour of the Council that the proposal would harm the vitality and viability of the shopping centre. The Inspector noted "vacancy rates are not high and Marlborough clearly offers a wide range of facilities and attractions. The level of retail provision, however, is also not high and I consider the loss of the appeal premises as a retail unit in this important location could have a material detrimental effect on the attractiveness, vitality and viability of the centre. An approval on appeal in this instance could also increase pressure on the Council to approve further applications for change of use from retail".

The above appeal decision might therefore provide support for calls to refuse the current application. However the following considerations lead officers to form a different view: (a) Very little hard evidence was provided by either side in the appeal documentation in support of their respective cases. However the Inspector came to accept the Council's case that an erosion of the A1 retail offer would be detrimental to the health of the shopping centre; (b) In the current application we know as a matter of fact that the proposal is for a Caffe Nero outlet, and because (without wanting to condone its premature opening) that outlet is up and running and has been the subject of survey work by both officers and by the applicant, it is known that the outlet is attracting a level of clientele that is not indicative of a dead frontage. Policy ED18 does not prohibit changes of use away from A1 in the primary shopping frontage: alternative uses may be acceptable where they can be shown to make a positive contribution to the vitality and viability of the town centre, and; (c) Since 2009 there has been a material change in planning policy, namely the publishing of the NPPF. In the glossary definition of "primary frontages" at the back of the document, "food and drinks" uses are specifically listed amongst the retail uses which are characteristic of primary frontages. There has been an upsurge in "cafe culture" in recent years and an integration of leisure activity within the retail experience. This is reflected in this official recognition that food and drink uses feature highly in shopping centres and that the purchase of food and drink is an expected part of a town centre's offer. Whilst in planning terms cafes are still a distinct use from mainstream retail (i.e. A3 as opposed to A1), it is now more difficult to argue that cafes are harmful to the vitality and viability of shopping centres. (It may also be worth noting that the store at 10, High Street has remained vacant since the appeal decision, unfortunately not adding to the vitality of the town centre).

The heating and cooling to the premises is provided by ceiling mounted indoor cassette units supplied via a condenser unit located in the "back of house" area on the first floor (i.e. that part of the first floor not accessible to the public). The units installed replace the existing units that were installed previously on a like for like basis. The air from the condenser is discharged out through an existing louvre on the back wall of the premises.

The extract ventilation from the WC, store and back of house is by mechanical means via ductwork distribution systems. These extract systems discharge their air to the rear of the

condenser unit located in the back of house area on the first floor and out to atmosphere via the existing louvre as per the condenser air.

Objections were received from the owners of the flats above the premises prior to the cafe opening, on the grounds that noise, vibration and smells from the air conditioning and extraction units would be detrimental to the amenities of the occupiers of the flats. An objection was also received from the adjoining shop to the rear on the basis that the operation of the air conditioning and extraction units would be detrimental to their trade. However Environmental Protection have received no complaints since the cafe opened and having sought clarification over various points of detail from the applicant, raise no objection to the proposal. However they recommend the imposition of a precautionary condition requiring the submission of an acoustic and vibration impact assessment.

10. Conclusion

Policy ED18 only prohibits changes of use away from A1 in prime shopping frontages where the development would fail to make a positive contribution to the vitality and viability of the town centre. In this particular instance, which concerns a retrospective change of use with an A1 element, the evidence base shows a thriving business which is attracting significant numbers of customers, more than most surrounding retail businesses. It cannot therefore reasonably be concluded that the proposal is harming the vitality and viability of the town centre. Furthermore a recent appeal decision at Skipton indicates there would be little prospect of any refusal being upheld at appeal.

RECOMMENDATION

That planning permission be granted subject to the following conditions:

- 1 Within 6 weeks of the date of this permission an acoustic and vibration impact assessment of the air conditioning system shall be submitted for the approval of the local planning authority. The assessment shall determine the internal noise and vibration impact on the property above the café, and the external noise exiting the louvre. Any mitigation work identified as required and agreed to be so by the local planning authority shall be completed within three months of the submission of the report.

REASON: In the interests of residential amenity.

- 2 The ground and first floor of the premises shall only be used for A1 retail purposes or as a coffee shop serving coffee, other hot and cold drinks, sandwiches and other light refreshments for consumption on or off the premises.

REASON: The proposed use is acceptable but the Local Planning Authority wish to consider any future proposal for a change of use having regard to the circumstances of the case.

- 3 No primary cooking of unprepared food shall be carried on within the premises. Only reheated or cold food that has been prepared elsewhere shall be served within the premises.

REASON: In the interests of residential amenity.

- 4 The premises shall not be open for customers outside the following hours: (i) 07:00 - 18:00 Mondays to Fridays; (ii) 07:30 - 18:00 Saturdays, and; (iii) 08:30 - 18:00 Sundays.

REASON: In the interests of residential amenity.

- 5 This decision relates to documents/plans submitted with the application, listed below. No variation from the approved documents should be made without the prior approval of this Council. Amendments may require the submission of a further application. Failure to comply with this advice may lead to enforcement action which may require alterations and/or demolition of any unauthorised buildings or structures and may also lead to prosecution. Plan Ref. 1:1250 location plan received 20/03/12

Appendix – Appeal decision dated 29/06/2012 at 40-42 Sheep Street, Skipton